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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DR. CHARLES BARING TRAVERS GRANT,
a Citizen of Great Britain, *et al.*,
Petitioners,

v.

STATE OF MISSISSIPPI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

Respondents, by Mike Moore, Attorney General of the State of Mississippi, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Mississippi. That opinion is reported at 686 So.2d 1078 (Miss. 1996).

STATEMENT OF THE CASE

In the lower court, the instant action was a breach of contract suit filed by bondholders in the Chancery Court of Hinds County, Mississippi, to recover monetary relief against the State of Mississippi and State officials on pre-Civil War "Planters' Bank" bonds and "Union Bank" bonds. The consolidated suits were an attempt by bond-

holders to relitigate in state court an unsuccessful federal suit, *Barry v. Fordice,* 814 F.Supp. 511 (S.D. Miss. 1992), *affd.*, 8 F.3d 1 (5th Cir. 1993), in which the court held that the suit by bondholders to obtain monetary relief against the State and its officials was barred by the Eleventh Amendment.[1] The federal claims barred in *Barry* were ostensibly reformulated in the state court suit as "breach of contract" claims. The Chancery Court in its October 29, 1993, opinion held that the consolidated actions were barred by the running of the state statute of limitations, noting that the court didn't "know of any that runs over a hundred years." 2a. The Chancellor accordingly granted the State Defendants' motion for summary judgment based on the bar of the statute of limitations and ordered that the consolidated complaints be finally dismissed with prejudice.

The Chancery Court suits to recover on the pre-Civil War bonds were not filed until July 1993, 152 years after a default in interest, 141 years after a popular vote repudiation of the Planters' Bank bonds, and 126 years after the last bonds reached maturity. 4a. These suits were filed 120 years after a 7-year statute of limitations went into effect in 1873 which would have extinguished any possible right on the bonds in 1880 at the latest.

On appeal to the Mississippi Supreme Court, that court affirmed in relevant part the judgment of the Chancery Court, holding that the suits to recover on the pre-Civil War bonds were barred by the state law statute of limitations on sealed instruments and/or by *laches*. App. A. The Mississippi Supreme Court observed:

> The bondholder's cause of action came into being at the time the interest came due on the bonds and the State failed to pay. No suit was brought. The next

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[1] In *Monaco v. Mississippi*, 292 U.S. 313 (1934), this Court had held that a suit by the Principality of Monaco to recover on the Union Bank and Planters Bank bonds against the State was barred by the Eleventh Amendment.

claim came into existence when the State failed to pay when the debt came due on the bonds themselves. Again, no suit was brought. The seven-year statute of limitations went into effect in 1873, and no suit was filed to protect the claims and rights of the bondholders. "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). The bondholders did not file suit to protect their rights within the statutory time period. Therefore, this Court will not allow them to use equitable principles to circumvent their lack of diligence in bringing their suit over one hundred years after the statute of limitations has run.

14a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE PETITION DOES NOT SET FORTH OR DEMONSTRATE ANY OF THE CRITERIA THAT WARRANT REVIEW ON CERTIORARI.

The judgment below of the Mississippi Supreme Court held that state court suits on pre-Civil War bonds filed over one hundred years after the last bonds reached maturity were barred by a 7-year state statute of limitations and the doctrine of *laches*. The petition in this Court seeking to review that judgment sets forth none of the criteria or considerations that warrant review on certiorari by this Court under Rule 10.

The petition does not cite any conflict between the Mississippi Supreme Court holding and the decisions of other state courts of last resort or the United States Courts of Appeals. Moreover, the petition does not demonstrate any discernable conflict between the judgment below and decisions of this Court, nor does the petition articulate any "important question of federal law" at all as required by Rule 10. For obvious reasons, the state court breach of contract suits on the pre-Civil War bonds was *sui generis*, and the conclusion that suits filed over a hundred years

after a default might be too late is hardly an earth-shattering result or an "important" issue of public law which would merit the attention or guidance of this Court.

Moreover, the judgment below does not implicate any substantial questions of *federal* law at all: the petitioners asserted before the Mississippi Supreme Court that their suit was a simple state law breach of contract action, 30a; the Mississippi Supreme Court accepted this characterization, 31a; and the state law defenses of statute of limitations and *laches* were held dispositive on appeal. This Court does not review judgments in state law suits based on state law grounds of decision.

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION AS TO PETITIONERS' ESOTERIC ARGUMENTS REGARDING THE JAY TREATY OF 1794.

The petitioners suggest that the judgment below somehow warrants review in this Court to determine whether the State in defaulting on the bonds "violated" the Jay Treaty of 1794. Pet. at i. This claim, which can only be described as esoteric in nature, presents absolutely no arguable ground for review by this Court.

First, the Mississippi Supreme Court observed that the Jay Treaty by its own terms had "no application" to the bondholders' claims and held that even if it did the seven-year statute of limitations and doctrine of *laches* barred their claims because of unreasonable delay. 22a-23a. It is well-settled, and the petition does not question, that unless a limitation period for a federal claim is specifically provided by federal statute or treaty, then the most analogous state law limitations period applies. *Wilson v. Garcia,* 471 U.S. 261, 266-267 (1985); *Habich Tel-Oren v. Libyan Arab Republic,* 517 F.Supp. 542, 550 (D.D.C. 1981), *affd.*, 726 F.2d 774 (D.C. Cir. 1984). Accordingly, the judgment below on this point ultimately rests on dispositive state law grounds and does not present for review a federal question which could affect the outcome.

Second, in addressing the esoterica presented by petitioners, the Mississippi Supreme Court correctly held that the Jay Treaty of 1794 did not survive the subsequent War of 1812 and that Article X by its terms did not apply to simple defaults on public debt by state governments. 20a-23a. Moreover, the "question" posed by petitioners—whether the default on the bonds "violated" the Jay Treaty, Pet. at i, is not squarely presented, since the petitioners never addressed or demonstrated the essential prerequisite of a *private right of action* based on the Jay Treaty. Treaties of the United States do not create rights that are enforceable by private parties unless the right to sue is set forth. *Tel-Oren,* 726 F.2d at 808-810 (Bork, J., concurring); the terms of Article X of the Jay Treaty, even if it survives, plainly do not create a private right of action.

The unique, unfounded, and ultimately inconclusive arguments of petitioners regarding the Jay Treaty are not worthy of review by this Court.

III. THE PETITIONERS WAIVED ANY RIGHT TO ASSERT FEDERAL CONSTITUTIONAL CLAIMS BEFORE THIS COURT.

The petitioners directly claim before this Court at pages 11-13 of the petition that the State's actions regarding the Union Bank and Planters' Bank bonds was an "impairment" of contract and due process—"a violation of the United States Constitution." Pet. at 11. In addition to the dispositive fact that the judgment rests on state law statute of limitations grounds, the petitioners are guilty of sandbagging and misrepresentations to the Courts at each level of review. In order to avoid the preclusive effect of the *Barry* decision, *supra,* and *Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989), which holds that there is no cause of action for *federal* constitutional claims for monetary relief against a state or state agency in state or federal court,[2] petitioners asserted to the Mis-

[2] *See also Howlett v. Rose,* 496 U.S. 356, 365, 375-376 (1990).

sissippi Supreme Court that their suit in state court was only a "simple breach of contract" suit. 30a. The Mississippi Supreme Court accepted petitioners' characterization, and held that petitioners were *not* asserting federal claims. 31a. Before this Court, petitioners now seek review for a "violation of the United States Constitution." Pet. at 11.

By their direct representations to the Mississippi Supreme Court, and its holding in this regard, petitioners waived the right to now seek review in this Court of any federal-based claims and questions. The case may not now be reinvented in a different posture and the ever-changing representations of petitioners make them inappropriate parties to obtain review on certiorari.

CONCLUSION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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